LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
FEB 2 1953
HAROLD B. WILLEY, Clerk

No. 296

In the Supreme Court of the United States

OCTOBER TERM, 1952

AISTATE CONSTRUCTION COMPANY, PETITIONER

v.

MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR

amount of over $178,000 for resurfacing the road previously used as the main highway to New York (R. 23). Some of petitioner's contracts, also comprising a substantial part of the business, call for the furnishing of only materials to be used or applied by the customer or someone other than petitioner (R. 25).[2]

It is stipulated that "Except for certain types of material used for patching purposes in the winter season, practically all of the bituminous concrete material produced at Alstate's three plants is applied to highways, roads, etc. immediately after production" (R. 28). Moreover, the testimony of the employees reveals that the plant sites were the headquarters of the "on-the-road" employees as well as of the employees mixing the amesite (R. 34–35, 39), and, indeed there was considerable interchange between employees performing their duties at the plants and at the road sites (R. 34–40, 43–45). It is stipulated that there was no segregation at any of the three plants of the work of employees employed in pre-

[2] The statement by *amicus curiae* (Br. p. 3) of the "Question Presented" mistakenly assumes that the issue in the instant case is restricted to production of materials "for use by others" in the repair and maintenance work. The issue in *Johnson v. Tobin*, petition for certiorari pending, No. 336, this Term, is so limited. Whether the issue in *Thomas* v. *Hempt Bros.*, No. 410, this Term, is so restricted depends on what may be proved under the complaint there, to which a demurrer was sustained. As the facts are stated in petitioner's brief in that case (Br. pp. 1–2, 3), the issue is not so restricted.

paring the bituminous concrete materials according to the interstate highway or other uses for which those materials were produced (R. 28). Nor was there any such segregation among the truck drivers attached to the Cressona and Naginey plants (R. 11, 28).

Both courts below held that the employees were within the coverage of the Act, rejecting petitioner's contention that a distinction should be drawn between so-called "on-the-road" and "off-the-road" employees. The district court concluded that "the various plants of the defendant were all component parts of an integrated unit, eighty-five and one-half percent of whose total output was directed toward the improvement of various interstate facilities, and that all of the employees of the defendant are definitely within the scope of the statute" (R. 14, 10). The judgment enjoined petitioner from violating the overtime requirements of the Act with respect to "any of its employees engaged in commerce or in the production of goods for commerce, within the meaning of the Act" (R. 18). The Court of Appeals for the Third Circuit affirmed, stating that it could not subscribe to Alstate's contention "that its off-the-road employees, i. e., the mixers and other plant employees who produce the amesite, do not have such immediacy of participation in interstate commerce so as to bring them within its [the Act's] coverage" (R. 68), and that "Alstate's off-the-road employees, in producing

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Summary of argument	8
Argument:	
Employees engaged in the preparation and hauling of materials for use in the repair and maintenance of interstate highways, roads, and railroads are "engaged in commerce or the production of goods for commerce" within the meaning of the Fair Labor Standards Act	14
A. Materials produced specifically for use in the repair and maintenance of, and which become part of, interstate instrumentalities are produced "for commerce" within the meaning of the Act	16
1. The decision below gives to the statutory language "for commerce" its normal meaning	16
2. The legislative history prior to enactment of the Act shows that language limited to production "for transportation" was rejected in favor of production "for commerce" without qualification, and that the legislative intent was to give full scope to normal meaning of the language chosen	19
3. The legislative history subsequent to the Administrator's public announcement of the interpretation here in question, including unsuccessful attempts to change this specific interpretation by legislative amendment, shows apparent Congressional approval of the interpretation	24
4. The soundness of the decision below is not affected by the fact that the original administrative interpretation was different	32
5. The corrected administrative interpretation accords with the construction of the statutory language adopted by most courts, and in particular by a consistent line of decisions of the federal courts of appeals	35

Argument—Continued

Page

B. Employees engaged, as an integrated unit, in the repair and maintenance of interstate highways, roads, and railroads are "engaged in commerce," whether their work is "on the road" or "off the road" 44

Conclusion 53

CITATIONS

Cases:

Armour & Co. v. *Wantock*, 323 U. S. 126 18

Atlantic Co. v. *Walling*, 131 F. 2d 518 ..... 11, 36, 42

Barbe v. *Cummins Const. Co.*, 49 F. Supp. 168 40

Bennett v. *Loftis Co.*, 167 F. 2d 286 ..... 43, 48

Boutell v. *Walling*, 327 U. S. 463 ..... 14, 49, 52

Chapman v. *Home Ice Co.*, 136 F. 2d 353, certiorari denied, 320 U. S. 761 ..... 12, 36, 38, 41

Crabb v. *Welden Bros.*, 65 F. Supp. 369 40

Crabb v. *Welden Bros.*, 164 F. 2d 797 43

Dairymen's League Cooperative Ass'n v. *Brannan*, 173 F. 2d 57, certiorari denied, 338 U. S. 825 34

Federal Trade Commission v. *Bunte Bros.*, 312 U. S. 349 ..... 22, 24

Fitzgerald (J. F.) Const. Co. v. *Pedersen*, 324 U. S. 720 49

Fleming v. *Atlantic Co.*, 40 F. Supp. 654 ..... 11, 36

Fountain v. *St. Joseph Water Co.*, 352 Mo. 817, 180 S. W. 2d 28 40

Guess v. *Montague*, 110 F. 2d 500 53

Hamlet Ice Co. v. *Fleming*, 127 F. 2d 165, certiorari denied, 317 U. S. 634 39

Hansen v. *Salinas Valley Ice Co.*, 62 Cal. App. 2d 357, 144 Pac. 896 (1944) 39

Johnson v. *Tobin*, petition for certiorari pending, No. 336, 1952 Term 6

Kennedy v. *Silas Mason Co.*, 334 U. S. 249 44

Kirschbaum Co. v. *Walling*, 316 U. S. 517 ..... 16, 18, 33, 46

Laudadio v. *White Construction Co.*, 163 F. 2d 383 48

Lewis v. *Florida Power and Light Co.*, 154 F. 2d 751 ..... 12, 36, 39

McComb v. *Carter*, 8 WH Cases 489, 16 Labor Cases ¶ 64, 964 39

McComb v. *Johnson*, 174 F. 2d 833 44

McComb v. *Trimmer*, 83 F. Supp. 565 40

McLeod v. *Threlkeld*, 319 U. S. 491 ..... 24, 49, 51

National Labor Relations Board v. *Van Deusen*, 138 F. 2d 893 53

New Mexico Public Service Co. v. *Engel*, 145 F. 2d 636 48

Overnight Motor Co. v. *Missel*, 316 U. S. 572, rehearing denied, 317 U. S. 706 ..... 14, 47, 50

Overstreet v. *North Shore Corporation*, 318 U. S. 125 ..... 8, 10, 13, 14, 16, 17, 24, 45, 46, 49

Cases—Continued Page

Pedersen v. *Delaware, L. & W. R. Co.*, 229 U. S. 146 ..... 13, 49
Pedersen v. *J. F. Fitzgerald Construction Co.*, 318 U. S. 740, modified and petition for rehearing denied, 318 U. S. 742, and 324 U. S. 720 ..... 8, 13, 14, 16, 17, 45
Powell v. *U. S. Cartridge Co.*, 339 U. S. 497 17
Ramos v. *P. R. Cement Corp.*, 5 WH Cases 956, 10 Labor Cases ¶ 63,000 40
Ritch v. *Puget Sound Bridge and Dredging Co.*, 156 F. 2d 334 47
Roland Electric Co. v. *Walling*, 326 U. S. 657 40
Schroeder (E. C.) Co. v. *Clifton*, 153 F. 2d 385, certiorari denied, 328 U. S. 858, rehearing denied, 329 U. S. 821 ..... 12, 30, 31, 41, 43
Skidmore v. *Swift & Co.*, 323 U. S. 134 33
Southern United Ice Co. v. *Hendrix*, 153 F. 2d 689 ..... 36, 38, 41
Thomas v. *Hempt Bros.*, No. 410, 1952 Term 6, 15, 40, 43, 44
Tobin v. *Johnson*, 198 F. 2d 130, pending on petition for certiorari, No. 336, 1952 Term 11, 15, 16, 18, 35, 39, 40, 43, 44
United States v. *Darby Lumber Co.*, 312 U. S. 100 23
Virginian Railway Co. v. *System Federation*, 300 U. S. 515 ..... 50, 51
Walling v. *Craig*, 53 F. Supp. 479 40
Walling v. *Jacksonville Paper Co.*, 317 U. S. 564, affirming 128 F. 2d 395 ..... 13, 17, 45, 47, 50, 53
Walling v. *McCrady Const. Co.*, 156 F. 2d 932, certiorari denied, 329 U. S. 780 43
Walling v. *Staffen*, 5 F. R. D. 236 39
Western Union Telegraph Co. v. *Lenroot*, 323 U. S. 490 18
Wiley v. *Stewart Sand & Material Co.*, 240 Mo. App. 392, 206 S. W. 2d 362 40

Statutes:

Fair Labor Standard Act of 1938 (c. 676, 52 Stat. 1060, 29 U. S. C. 201) as amended by the Fair Labor Standards Amendments of 1949 (c. 736, 63 Stat. 910, 29 U. S. C. Supp V 201) 30
Preamble 23
Sec. 2 23
Sec. 3 ..... 2, 17, 29, 31
Sec. 7 3
Fair Labor Standards Amendments of 1949, c. 736, Sec. 16, 63 Stat. 910, at 920 ..... 11, 32
Portal-to-Portal Act of 1947, c. 52, 61 Stat. 84 30

Congressional material:

Hearings, S. 1349, before Subcommittee of Senate Committee on Education and Labor, 79th Cong., 1st sess., pp. 411–421 ..... 25, 27
Hearings, S. 1349, before Senate Committee on Education and Labor (Part 2), 79th Cong., 2d sess 25

Congressional material—Continued

	Page
Hearings, H. R. 40, H. R. 274, H. R. 284, H. R. 1422, H. R. 2578, H. R. 2980, H. R. 3764, H. R. 3766, H. R. 3886, H. R. 3976, before Subcommittee No. 4 of House Committee on Education and Labor, 80th Cong., 1st sess.:	
Volume 1	26, 28
Volume 2	26, 27
Volume 3	26, 28, 29
Volume 4	26, 28
Hearings, H. R. 2033, before House Committee on Education and Labor, 81st Cong., 1st sess.:	
Volume 1	26, 28
Volume 2	26
Hearings, H. R. 2788, before Subcommittee No. 4 of House Committee on the Judiciary, 79th Cong., 1st sess	25, 27
Hearings, H. R. 584, H. J. Res. 91, before Subcommittee No. 2 of House Committee on the Judiciary, 80th Cong., 1st sess., pp. 503–505	25, 27
Hearings, S. 70, before Subcommittee of Senate Committee on the Judiciary, 80th Cong., 1st sess	25, 27
Hearings, H. R. 3719, H. R. 3837, H. R. 3844, H. R. 3914, H. R. 3928, H. R. 4130, H. R. 4222, before House Committee on Labor, 79th Cong., 1st sess	25, 28
Hearings, S. 49, S. 154, S. 160, S. 161, S. 557, S. 731, S. 1043, S. 1076, S. 1288, S. 1400, S. 1404, S. 1509, S. 2062, S. 2386, before Subcommittee of Senate Committee on Labor and Public Welfare, 80th Cong., 2d sess.	
Part 1 (pp. 237–250)	26, 28
Part 2 (pp. 1229–1231)	26, 27, 29
Hearings, S. 58, S. 67, S. 92, S. 105, S. 190, S. 248, S. 653, before Subcommittee of Senate Committee on Labor and Public Welfare, 81st Cong., 1st sess	26
Hearings S. 336, H. R. 858, before Subcommittee of Senate Committee on Labor and Public Welfare, 81st Cong., 1st sess	26
Statement of the Conferees of the House, 95 Cong. Rec. 14,928, October 18, 1949	30
Statement of a Majority of the Senate Conferees, 95 Cong. Rec. 14,874, October 18, 1949	30
81 Cong. Rec. 7957	19
83 Cong. Rec. 7449–50	19
83 Cong. Rec. 9166–9176	20, 51
83 Cong. Rec. 9168–69, 9176	21, 22
H. Rep. No. 1453, 81st Cong., 1st sess	30
H. Rep. No. 2182, 75 Cong., 3d sess	19
S. 2475, 75th Cong., 1st sess	19

Miscellaneous:

	Page
12 F. R. 7665, 29 C. F. R., 1951 Supp., c. V, Part 776	34
General Statement as to the Coverage of the Wage and Hour Provisions of the Fair Labor Standards Act of 1938, issued July 1947, 29 C. F. R., 1947 Supp., Part 776 (12 F. R. 4583), Section 776.7	33, 34
Interpretative Bulletin No. 1, "General Statements as to Coverage of the Fair Labor Standards Act of 1938", Sept. 1938 (1940 Wage Hour Manual 129)	34
Interpretative Bulletin, General Coverage of the Wage and Hour Provisions of the Fair Labor Standards Act of 1938, as amended, 29 C. F. R., c. V, Part 776, subpart A, May 1950 (15 F. R. 2925)	33
Interpretative Bulletin No. 5, revised Nov. 1939, "Further Statement as to Coverage of the Fair Labor Standards Act of 1938" (1940 Wage Hour Manual 131)	34
Press Release A-14 issued March 1945, 1945 W. H. Man. 1497	33
Webster's New International Dictionary, 1945 ed., p. 984	18

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 296

ALSTATE CONSTRUCTION COMPANY, PETITIONER

v.

MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR

OPINIONS BELOW

The opinion of the district court (R. 7–15) is reported in 95 F. Supp. 585. The opinion of the Court of Appeals (R. 66–70) is reported in 195 F. 2d 577.

JURISDICTION

The judgment of the Court of Appeals was entered on April 9, 1952 (R. 71). A petition for rehearing was denied May 5, 1952 (R. 72). On July 11, 1952, the time for filing a petition for writ of certiorari was extended to August 29, 1952 (R. 74). The petition was filed August 27, 1952,

and certiorari was granted on December 8, 1952 (R. 75). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether employees engaged in the preparation and hauling of materials for use in the repair and maintenance of interstate highways, roads, and railroads are "engaged in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U. S. C. 201) as amended by the Fair Labor Standards Amendments of 1949 (c. 736, 63 Stat. 910, 29 U. S. C., Supp. V, 201) are:

> Sec. 3. As used in this Act—
>
> * * * * *
>
> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.
>
> * * * * *
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purpose of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufactur-

ing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

* * * * * *

Sec. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives a compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

Petitioner is engaged in resurfacing existing highways, public roads, and streets used to a substantial extent by interstate traffic (R. 20–21, 27). As the district court found, petitioner's "road work, covered by contracts with the Commonwealth of Pensylvania and many of its political subdivisions, involved no completely original construction, it consisted entirely in some form of resurfacing of previously existing roads, either interstate as such or connecting with an interstate system, with the slight exception involved in the straightening of old road lines * * *" (R. 13). "A typical case would be a through highway carrying a State and frequent-

ly a United States highway number. It may originally have been dirt, but it was none the less a part of an interstate system of highways." (R. 14). Resurfacing frequently also included patching and other preliminary repair on the existing roadbeds (R. 48), eliminating hills (R. 12), and widening curves and shoulders.

The district court found that eighty-five and one-half per cent (85.5%) of petitioner's total output "was directed toward the improvement of various interstate facilities" (R. 14). Petitioner's contracts with the State of Pennsylvania and its political subdivisions totaled $825,025.83, or over 70 per cent of its total business of $1,172,276.70 during the three and one-half years examined (computed from the table in the Stipulation following R. 22). In addition, over 15 per cent of petitioner's business ($177,589.47 in the same period) was with interstate railroads and industrial concerns (*ibid.*). Petitioner's "industrial and railroad work was in each cited instance done for the improvement of the facilities of concerns engaged in interstate commerce" (R. 13). Less than 15% of the business, characterized as "private" work, apparently involved no interstate activity (R. 13).

Petitioner's headquarters are at Harrisburg, Pennsylvania, and it conducts its operations through its plants at Hanover, Cressona, and Naginey (R. 19–20) as "component parts of an integrated unit" (R. 14). Except for the

relatively small amount of private work, each of the three plants participated substantially in each of the types of business listed above in each of the years examined (See table in the stipulation following R. 22).

The materials for the resurfacing operations are produced at all three of petitioner's plants, where the ingredients are combined to produce a bituminous concrete substance known as "amesite" (R. 20). The amesite is then trucked to the road sites where it is applied, frequently while still hot (R. 20–21, 28 par. 7). The employees whose status is here in dispute are those who work in the plants and on the trucks.[1] The close integration which the district court found between the production of this material at the three plant sites and its application to the roads is illustrated in many ways. Much of petitioner's work consists of applying as well as producing the resurfacing materials, pursuant to contracts calling for a completed result involving both labor and materials (R. 20–21). One notable example of this type of work was the contract in the

[1] At the time this suit was filed, petitioner was not paying overtime compensation in accordance with the Act to *any* of its employees (R. 26, par. 13), and petitioner contested coverage with respect to all of its employees, including the employees who actually applied the amesite on the roads, one of its main contentions being that its work was outside the scope of the Act because it was "original construction." See district court opinion (R. 7, 11–14). This contention was abandoned on appeal (R. 66, 68).

material which is used to repair and maintain the surfaces of instrumentalities of commerce, are engaged 'in the production of goods for commerce'" (R. 69).

SUMMARY OF ARGUMENT

On the facts of the instant case, where the work of producing the road materials is directly integrated with the application of those materials to the interstate roads being repaired, the employees preparing the materials are clearly "engaged in commerce or the production of goods for commerce."

A

1. Since it is well established by the decisions of this Court that the maintenance and repair of instrumentalities of interstate commerce is "so intimately related to interstate commerce 'as to be in practice and legal contemplation a part of it'" (*Overstreet* v. *North Shore Corporation*, 318 U. S. 125, 130, and *Pedersen* v. *J. F. Fitzgerald Construction Co.*, 318 U. S. 740, modified and petition for rehearing denied, 318 U. S. 742, and 324 U. S. 720, 724–25), the production of materials for use in the repair of, and which become part of, such instrumentalities is production of goods "for commerce" within the normal meaning of those words. Petitioner would read the language as if it said production of goods "for shipment in" or "intended for transportation or sale in" commerce. Not only does the statute not say that, but the

legislative history of this particular phase of coverage shows that language in some of the earlier bills, which would have so stated, was eliminated before the enactment of the Act.

2. The legislative history prior to the original enactment of the Act, as well as the subsequent legislative conduct with respect to amendments to the Act, confirm the intent of Congress to give full scope to the normal meaning of the language "production of goods for commerce." Intermediate bills, including the bill passed by the Senate before conference, provided for coverage in terms of persons engaged "in the production of unfair labor goods *intended to be sold or shipped in commerce*" or *"intended for transportation or sale"* (emphasis supplied) in commerce. This language was rejected in the conference committee in favor of the language now in the Act, which uses the broad phase "for commerce" and omits the qualifying language. Nothing in the legislative debates supports the contention that Congress intended to limit the scope of this phase of coverage in the manner urged by petitioner and *amicus curiae*. On the contrary, as appears from the debate as a whole, there is every reason to believe that Congress intended the coverage to be as broad as the normal meaning of the language it used. Petitioner's argument that, because Congress discarded the phrase "affecting commerce" the Act cannot apply here, ignores the fact that when this lan-

guage was discarded, the "intended for transportation" language was also deleted, and the unqualified phrase "production for commerce" was adopted. Although the language adopted is not coextensive with the constitutional power of Congress over interstate commerce, "Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing" the language which Congress deliberately chose. *Overstreet* v. *North Shore Corp.*, 318 U. S. at 128.

3. Congress has held extensive hearings on various proposed amendments to the Act since the Administrator's public announcement of the interpretation upheld by the court below, and this interpretation was called to the attention of Congress on many occasions both by the Administrator and by representatives of industry trade associations (including *amicus curiae* here), who proposed specific amendments to change that interpretation. All the attempts to change this interpretation by legislative amendments have been unsuccessful, although numerous amendments, some restrictive of coverage, have been enacted. Thus, far from disapproving this administrative interpretation, it appears that Congress, with full knowledge of it, left it in effect by providing in the 1949 Amendments to the Act that "Any order, regulation, or interpretation of the Administrator * * * shall remain in effect * * * except to the extent that [they] * * * may be

inconsistent with the provisions of this [1949] Act * * *." Section 16 (c) of the Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910, 920.

4. In view of this legislative conduct during the years after the Administrator corrected his original interpretation, the fact that the original administrative interpretation was different is of little significance. Plainly his change of view does not affect the validity and soundness of the present interpretation, to which he has consistently adhered for almost eight years with the apparent approval of the Congress.

5. The corrected administrative interpretation accords with the construction of the statutory language adopted by most of the courts, and particularly by a consistent line of decisions in the federal courts of appeals. This construction of the statutory language was adopted as early as June 1941 in the opinion of District (now Circuit) Judge Russell in *Fleming* v. *Atlantic Co.*, 40 F. Supp. 654, 660 (N. D. Ga.), "affirmed throughout" by the Fifth Circuit *sub nom. Atlantic Co.* v. *Walling*, 131 F. 2d 518. Since that date the three other circuits which have considered the question—the Third, Sixth, and Eighth—have adopted the same construction. The Third Circuit below in the instant case and the Eighth Circuit (in *Tobin* v. *Johnson*, 198 F. 2d 130, pending on petition for certiorari, No. 336, this Term) by unanimous decisions have applied

it specifically to "off the road" workers producing materials for the repair and maintenance of interstate roads. The Sixth Circuit applied it with respect to the production of ice for refrigeration of railroad cars. *Chapman* v. *Home Ice Co.*, 136 F. 2d 353 (C. A. 6), certiorari denied, 320 U. S. 761; *Southern United Ice Co.* v. *Hendrix*, 153 F. 2d 689 (C. A. 6). See also the Fifth Circuit's decision in *Lewis* v. *Florida Power and Light Co.*, 154 F. 2d 751, involving the production of electricity for use in operating instrumentalities of commerce. Although there has been some disagreement in the federal district court and in state court decisions, no federal court of appeals has ruled to the contrary. The decision of the court in *E. C. Schroeder* v. *Clifton*, 154 F. 2d 385 (C. A. 10), as distinguished from the opinion of one Judge of that court, is not to the contrary.

B

In view of the close and direct integration of the work of the "off the road" or plant employees and the "on the road" employees in the instant case, the decision below would also appear to rest soundly on the "in commerce" phase of the Act's coverage. The "practical considerations" underlying the decisions of this Court which have held repair and maintenance workers on interstate instrumentalities to be "engaged in commerce" are virtually the same with respect to petitioner's "off the road" and "on the road"

employees. *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 128, 130; *Pedersen* v. *Fitzgerald Const. Co.*, 318 U. S. 740, and 324 U. S. 720, 724–25. In view of the finding that the functions at petitioner's mixing plans are "all component parts of an integrated unit * * * directed toward the improvement of various interstate facilities," a distinction between "on the road" and "off the road" employees would not seem warranted on any "practical" or realistic basis.

If the work is viewed as "an integrated unit," the employees mixing and hauling the materials to be applied to the roads immediately, frequently while still hot, would seem no less "intimately related to interstate commerce" or 'vital to the proper functioning of these structures as instrumentalities of interstate commerce" (*Overstreet*, 318 U. S. at 128 and 130), than the employees who actually apply the materials to the roads. Certainly the truck drivers who haul the materials to the roads are indistinguishable from the employee carrying a bolt to be used in the repair of a railroad bridge in *Pedersen* v. *Delaware, L. & W. R. Co.*, 229 U. S. 146, which this Court has repeatedly recognized as authoritative on the scope of the "in commerce" coverage of the Fair Labor Standards Act. And the employees engaged in mixing the materials would appear just as intimately related to interstate commerce as the "off the road" clerical workers and the rate clerk held to be engaged "in commerce" in *Walling* v. *Jack-*

sonville Paper Co., 317 U. S. 564, affirming 128 F. 2d 395, 398 (C. A. 5), and *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, rehearing denied, 317 U. S. 706; or the "off the road" service and maintenance employees in *Boutell* v. *Walling*, 327 U. S. 463; or the back-shop railroad employees in *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515.

ARGUMENT

EMPLOYEES ENGAGED IN THE PREPARATION AND HAULING OF MATERIALS FOR USE IN THE REPAIR AND MAINTENANCE OF INTERSTATE HIGHWAYS, ROADS, AND RAILROADS ARE "ENGAGED IN COMMERCE OR THE PRODUCTION OF GOODS FOR COMMERCE" WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT

As stated by the courts below (R. 11, 68), petitioner admits that "its employees actually working on the highway or other instrumentality of interstate commerce itself, applying amesite in the repair or maintenance thereof * * * are within the protection of the Fair Labor Standards Act." Petitioner seeks to draw a distinction, however, between the employees, whom it designates as "on-the-road," and the so-called "off-the-road" employees who prepare and haul the materials and road mixes to be used in the repair work. Both courts below, in rejecting such a distinction, relied upon this Court's decisions in *Overstreet* v. *North Shore Corporation*, 318 U. S. 125, and *Pedersen* v. *J. F. Fitzgerald Construc-*

tion Co., 318 U. S. 740, modified and petition for rehearing denied, 318 U. S. 742, and 324 U. S. 720, 724–25, which held that employees engaged in the repair and maintenance of interstate instrumentalities are "engaged in [interstate] commerce" 324 U. S. at 724. The Court of Appeals reasoned that since the maintenance of interstate highways was interstate commerce, the employees who produced the materials used in such maintenance were engaged "in the production of goods *for* commerce" (emphasis supplied) (R. 69).

In the instant case, where the work of producing the materials is directly integrated with the application of those materials to the roads under contracts which provide that petitioner furnish both the materials and the labor for the repair work, we submit that the employees involved are engaged both "in commerce" and in the "production of goods for commerce".[3]

[3] It may be noted that the administrative interpretation asserting coverage generally over the production of road materials for repair of interstate instrumentalities has been predicated only on the "production of goods for commerce" phase of coverage. See *Tobin* v. *Johnson*, 198 F. 2d 130, pending on petition for certiorari No. 336, this Term; see also *Thomas* v. *Hempt Bros.*, No. 410, this Term, in this Court. The brief of *amicus curiae* is directed solely to this general question and its statement of the "Question Presented" (Br., p. 3) ignores the fact that in the instant case petitioner's production of materials is substantially, if not predominantly, for its own use in performing its repair contracts. Although petitioner also produces a substantial amount of materials "for use by others" (R. 25), petitioner, as its name indicates, is essentially a "construction company"

A. MATERIALS PRODUCED SPECIFICALLY FOR USE IN THE REPAIR AND MAINTENANCE OF, AND WHICH BECOME PART OF, INTERSTATE INSTRUMENTALITIES ARE PRODUCED "FOR COMMERCE" WITHIN THE MEANING OF THE ACT.

I. *The decision below gives to the statutory language "for commerce" its normal meaning.*— In the instant case, as in the landmark case of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 524, "We start with the weighty opinions of the two Circuit Courts of Appeals that the employees here are within the Act" because they are engaged in the "production of goods for commerce." Both the Third Circuit below and the Eighth Circuit (in *Tobin* v. *Johnson*, 198 F. 2d 130, pending on petition for certiorari, No. 336, this Term) have so ruled by unanimous decisions. As we show at pp. 35–44, *infra*, no federal appellate court has held to the contrary.

These decisions are predicated on the literal and normal meaning of the language of the Act. If, as this Court has held (in the *Overstreet* and *Pedersen* cases, *supra*), the maintenance and repair of instrumentalities of interstate commerce constitute an integral part of such commerce, and the highways themselves are in interstate commerce, it follows, literally and logically, that the

---

and its employees are engaged in producing the materials work, without segregation, on materials for petitioner's own repair contracts and on materials for others. As noted in the Statement of Facts, it is stipulated that there was no segregation of the work performed by the off-the-road employees at the plants engaged in the production of materials for the various projects (R. 28).

production of materials for use in the repair of, and which actually become part of, such highways is production of goods "*for* commerce" (emphasis supplied). Contrary to petitioner's assertion, this construction is not novel nor does it require any stretching of the legislative language or purpose. It gives to the language of the Act the normal meaning of the words employed.

The breadth of the definition of "commerce" in Section 3 (b) of the Act is now well established. "It is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce." *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 567. "And in determining what constitutes 'commerce' or 'engaged in commerce' we are guided by practical considerations," so that employees engaged in "operational and maintenance activities * * * vital to the proper functioning * * * of instrumentalities of interstate commerce" are "engaged in commerce." *Overstreet*, 318 U. S. at 128, 130; *Pedersen*, 318 U. S. 740, and 324 U. S. 724–725. As more recently reemphasized by this Court: "The Act declared its purposes in bold and sweeping terms. Breadth of coverage was vital to its mission. Its scope was stated in terms of substantial universality * * *." *Powell* v. *U. S. Cartridge Co.*, 339 U. S. 497, 516. Therefore, "the policy of Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase 'engaged in commerce'". *Overstreet*, 318 U. S. at 128.

As observed by the court of appeals in *Tobin* v. *Johnson* (198 F. 2d at 132), it has also been recognized by this Court "that the phrase 'production for commerce' is 'obviously' more flexible and more inclusive than the phrase 'engaged in commerce.'" See *Armour & Co.* v. *Wantock*, 323 U. S. 126, 131. Although the word "for" is not specially defined in the Act, it is a word "of ordinary speech" to be given all the meaning it has "in ordinary intercourse in this context." *Western Union Telegraph Co.* v. *Lenroot*, 323 U. S. 490, at 503. The popular understanding and dictionary definition of the word "for" includes "as a preparation towards * * * to serve as, or as part of; to supply the need of; in order to effect." *Webster's New International Dictionary*, 1945 Ed. p. 984. As the road material here is stipulated to have been produced directly and specifically and immediately "for use in the construction, extension, repair, resurfacing, reconstruction, and maintenance of existing [interstate] highways" (R. 28) which indisputably are in interstate commerce, its production would seem to be clearly "for commerce" within the "normal and spontaneous meaning of the language." See *Kirschbaum Co.* v. *Walling*, 316 U. S. at 524.

Petitioner would read the language as if it said production of goods "for shipment in" or "intended for transportation or sale in" commerce. But the statute does not say that. Indeed, the legislative history of this particular

phase of coverage shows that original language which would have so stated was eliminated.

2. *The legislative history prior to enactment of the Act shows that language limited to production "for transportation" was rejected in favor of production "for commerce" without qualification, and that the legislative intent was to give full scope to the language chosen.*—In their intermediate stages, virtually all of the Senate bills and the bill originally reported to the House provided for coverage in terms of "any employee engaged in interstate commerce or in the production of goods *"intended for transportation or sale"* in commerce. [See, e. g., S. 2475, 75th Cong., 1st Sess., as introduced in the Senate on May 24, 1937, Section 7 (c); as passed by the Senate on July 31, 1937, Section 7 (2); as referred to the House Labor Committee on August 2, 1937, and as referred to the House on August 6, 1937, Section 7 (2)]. The bill which was passed by the Senate (81 Cong. Rec. 7957) contained this provision, while the bill passed by the House applied to employers "engaged in commerce in any industry affecting commerce" (Sections 4 and 5, H. Report No. 2182, 75th Congress, 3rd Session, page 2; 83 Cong. Rec. 7449–50). But the Senate Bill, like the House Bill, was rejected in the conference committee in favor of the language now in the Act, which uses the broad phrase "for commerce" and omits the qualifying language of the Senate-passed bill requiring

that the production be intended "for transportation or sale" or shipment in commerce.

Thus, Congress omitted language which would have limited the "production" phase of coverage to production of goods for shipment, transportation, or sale. Nor is there anything in the legislative debates to support the contention that Congress intended to limit the scope of this phase of coverage in the manner urged by petitioner and *amicus curiae*. The excerpts from the colloquy between Senators Bailey and Borah, quoted in the brief of *amicus curiae* (pp. 11–12), when read in their context, reveal an intent quite opposite from that suggested in the brief of *amicus curiae*. The colloquy was concerned only with the question whether the bill was within the *constitutional* power of Congress under the commerce clause. Naturally the Senators began with a discussion of the most significant application—to the factory shipping its product interstate. But nothing in the quotation or its context indicates an intent to limit the coverage of the Act to that example. On the contrary, both Senators Bailey and Borah (and other Senators who joined the discussion) obviously felt that the coverage of the bill extended to other situations that might not involve shipment of goods in commerce, as appears from the debate as a whole (83 Cong. Rec. 9166–9176, 75th Cong. 3rd Sess.) and from the following portions in particular.

In the portions of the colloquy immediately following the excerpts quoted in the brief of *amicus curiae,* Senator Borah spoke in considerably broader terms than the *shipment* of goods in interstate commerce. Thus he took the position that a back-shop employee "in a machine shop of a railroad company, who himself individually was never in the channels of trade, who lived and did his work solely within the State as a workman in a machine shop" should be subject to Federal wage and labor regulation "as part of the railroad system" (83 Cong. Rec., pp. 9168–69, 75th Cong., 3d Sess.). When Senator Bailey agreed to the soundness of this suggestion,[4] but sought to distinguish the production of what he termed "industry" as in a cotton mill, Senator Borah rejected such a distinction, stating:

> * * * Take the case of any industry; I do not care what the industry is: if, *as a system,* it is engaged in interstate commerce *and the workman is a necessary part of carrying on the system,* my contention is

[4] Senator Bailey even added that "the instrumentality idea as applied to railroads takes in the whole system" including "every man wherever he may be and whatever he is doing, providing he is doing something with regard to that system" (*id.* at 9169), and that he "would have no difficulty in saying that the regulatory power of the Congress would attach" to "a worker in a machine shop on a railroad who never left the State in his life but who was repairing engines engaged in interstate commerce, or *cars so related to interstate commerce, even if they never left the State themselves*" (*id.* at 9170, emphasis supplied).

> that the Congress of the United States may regulate his minimum wage * * *.
>
> * * * * * *
>
> I said a few minutes ago that in order that the worker shall be subject to regulation in his minimum wage under this bill, it must be shown that he is so far engaged in interstate commerce *as to be a producer of a part of the working machinery of that system* [*Id.* at 9169, emphasis supplied].

Thus, although it may be true that when the Act was passed the legislators spoke more frequently in relation to the most significant situation to which the Act was addressed—production of goods to be transported across state lines—it is clear that the language employed was not intended to be limited to that situation. The statutory language was chosen with great deliberation. A limitation to the concept which petitioner would now attribute to Congress was not accepted, and there is every reason to believe that Congress intended the coverage to be as broad as the normal meaning of the language it used.

Although, as this Court has held, Congress adopted language which is not coextensive with its constitutional power, in that it discarded the "affecting commerce" phrase and language encompassing local production which merely competed with interstate produers (as in *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349), nevertheless Congress substituted a phrase of very broad scope, and did so on the basis that produc-

tion of goods for commerce *affects* commerce.[5] Petitioner's argument that, because Congress discarded the phrase "affecting commerce" in the operative provisions of the Act, the Act cannot apply here, overlooks the fact that when this phrase was deleted the broad phrase "production of goods for commerce" was selected in preference to the qualified language of the Senate bill. Petitioner also overlooks the fact that inclusion of "production" within the coverage of the Act was expressly predicated on the finding that such production affects commerce. It was precisely because the production "is so related to the commerce and so *affects* it" (emphasis supplied) that this Court sustained the constitutional validity of the application of this Act to the production of goods for commerce. *United States* v. *Darby Lumber Co.*, 312 U. S. 100, 119–123. Obviously the Act applies to many activities which "affect commerce" even though it does not use that phrase. Stripped of its verbiage, petitioner's argument is that because Congress has not included *all* activities

[5] Thus the preamble describes the Act as one "to provide for the establishment of fair labor standards in employment in *and affecting* interstate commerce, and for other purposes" (emphasis supplied); and Section 2 (a) "Finding and Declaration of Policy" states, *inter alia*, that the existence of substandard labor conditions "in industries engaged in commerce or in the production of goods for commerce * * * (2) burdens commerce and the free flow of goods in commerce; * * * (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce."

affecting commerce, it must have excluded some production of goods for commerce which affects commerce. This Court has rejected the argument even when it appeared in more plausible context. In *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 128, the Court cautioned that "Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase 'engaged in commerce.'" *A fortiori*, there is no reason for restricting the broader and more flexible phrase "production of goods for commerce" more narrowly than the normal meaning of the language requires.[6]

3. *The legislative history subsequent to the Administrator's public announcement of the interpretation here in question, including unsuccessful attempts to change this specific interpretation by legislative amendment, shows apparent Congressional approval of the interpretation.*—Since the enactment of the Act there have been several hun-

[6] The assertion by *amicus curiae* (Br. pp. 14–15) that the Government's construction wipes out the limitations Congress intended to place on the scope of the Act when it deleted "affecting commerce" language plainly exaggerates the effect of the Government's position. There still remains outside the scope of the Act a substantial area of activities within the constitutional power of Congress to regulate, such as production of the type involved in *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, the handling and distribution of goods after arrival from an out-of-State source (see *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564), and the preparation of goods to supply personal needs of employees engaged in interstate commerce (as in *McLeod* v. *Threlkeld*, 319 U. S. 491).

dred bills introduced in both Houses of Congress proposing amendments to the Act, including several proposals for comprehensive revisions of its coverage. Extensive hearings have been held on various of these bills in the 79th, 80th, and 81st Congresses,[7] all during the period (1945–

[7] *79th Congress, 1st Session:*

Hearings, S. 1349, before Subcommittee of Senate Committee on Education and Labor, September 25–28; October 2, 4, 5, 9, 10, 12, 18–19, 23, 25–26, 1945 (Part 1) [to raise minimum wages and to make other amendments].

Hearings, H. R. 2788, before Subcommittee No. 4 of House Committee on the Judiciary, June 11, 13, 27; July 2, 1945 (Serial No. 9) [to enact a statute of limitations].

Hearings, H. R. 3719, H. R. 3837, H. R. 3844, H. R. 3914, H. R. 3928, H. R. 4130, H. R. 4222, before House Committee on Labor, October 15–19, 22–26, 30–31; November 1–2, 5–9, 13–15, 1945 [to raise minimum wage and to make other amendments].

2d Session: Hearings, S. 1349, before Senate Committee on Education and Labor, January 18–19, 21, 1946 (Part 2) [to raise minimum wage and to make other amendments].

80th Congress, 1st Session:

Hearings, S. 70, before Subcommittee of Senate Committee on Judiciary, January 15–18, 20–23, 25, 27, 30, 1947 [to exempt employers from liability for portal-to-portal type activity].

Hearings, H. R. 584, H. J. Res. 91, before Subcommittee No. 2 of House Committee on Judiciary, February 3–7, 10, 1947 [to prohibit recovery for portal-to-portal type activity, and to enact statute of limitations].

Hearings, H. R. 40, H. R. 274, H. R. 284, H. R. 1422, H. R. 2578, H. R. 2980, H. R. 3764, H. R. 3766, H. R. 3886, H. R. 3976, before Subcommittee No. 1 of House Committee on Education and Labor, June 27, 30; July

1949) after the Administrator had publicly interpreted the Act as applicable to persons such as petitioner. Many amendments have been enacted. The significant fact emerging from this legislative history in so far as the instant case is concerned is that although the statute was changed in other respects, no amendment was adopted with respect to the situation here involved, despite the fact

---

1–2, 7–11, 14, 1947. (Volume 1) [to raise minimum wage, and to make other amendments]; October 20–22, 24, 27–31, 1947 (Volume 2) [scope of hearings broadened to include other sections of the Act, and to determine specific types of amendments to be considered after Congress met in January 1948]; November 5–8, 10–15, 1947 (Volume 3) [*id.*]; November 17–21, 24–25; December 17, 1947 (Volume 4) [*id.*].

2d Session: Hearings, S. 49, S. 154, S. 160, S. 161, S. 557, S. 731, S. 1048, S. 1076, S. 1288, S. 1400, S. 1404, S. 1509, S. 2062, S. 2386, before Subcommittee of Senate Committee on Labor and Public Welfare, April 19–23, 26, 1948 (Part 1); April 27–30; May 3–4, 1948 (Part 2) [comprehensive amendment of the Act].

81st Congress, 1st Session:

Hearings, S. 336, H. R. 858, before Subcommittee of Senate Committee on Labor and Public Welfare, March 2–3, 5, 7–10, 14, 1949 [to clarify overtime compensation requirements of the Act].

Hearings, S. 58, S. 67, S. 92, S. 105, S. 190, S. 248, S. 653, before Subcommittee of Senate Committee on Labor and Public Welfare, April 11–14, 18–22, 1949 [to broaden coverage, to raise minimum wage, and to make other amendments].

Hearings, H. R. 2033, before House Committee on Education and Labor, January 27–28, 31; February 1–5, 1949 (Volume 1); February 7–9, 14–18, 1949 (Volume 2) [to broaden coverage, to raise minimum wage, and other comprehensive amendments].

that the pertinent official interpretation was specifically drawn to the attention of Congress by representatives of the Association of Ice Industries and of the Sand and Gravel Association (*amicus curiae*), and by the Administrator of the Wage and Hour Division, on many occasions.[8]

---

[8] *National Sand and Gravel Association and National Ready-Mix Concrete Association, through the Executive Secretary for both Associations, Vincent P. Ahearn:*

Hearings, H. R. 2788 before Subcommittee No. 4 of House Committee on Judiciary, 79th Cong., 1st Session, pp. 35–37.

Hearings, S. 79, before Subcommittee of Senate Committee on Judiciary, 80th Cong., 1st Sess., pp. 810–811.

Hearings, H. R. 584, H. J. Res. 91 before Subcommittee No. 2 of House Committee on Judiciary, 80th Cong., 1st Session, pp. 503–505.

Hearings, H. R. 40, etc., Proposed Amendments of the Fair Labor Standards Act, before Subcommittee No. 4 of House Committee on Education and Labor, 80th Cong., 1st Session, pp. 1373–1379 (Volume 2) [Accompanied by Charles A. Horsky, Esquire, Counsel for the National Sand and Gravel Association, Washington, D. C.]

Hearings, S. 49, S. 154, S. 160, S. 161, S. 557, S. 731, S. 1048, S. 1076, S. 1288, S. 1400, S. 1404; S. 1509, S. 2062, before Subcommittee of Senate Committee on Labor and Public Welfare, 80th Cong., 2d Session, pp. 1229–1231 (Part 2).

National Association of Ice Industries, through its General Counsel, William T. Jobe:

Hearings, S. 1349, before Subcommittee of Senate Committee on Education and Labor, 79th Cong., 1st Session, pp. 411–421.

Hearings, H. R. 3914, H. R. 3928, H. R. 4222, H. R. 4130, H. R. 3844, H. R. 3837, H. R. 3719, before House Committee on Labor, 79th Cong., 1st Session, pp. 431–440.

The Administrator made a full explanation of the interpretation and the circumstances under which it was adopted and first announced in Press Release A-14.[9] The General Counsel of the National Association of Ice Industries, and the Secretary of the National Sand and Gravel Association (*amicus curiae*), and National Ready-Mix Concrete Association appeared before both Senate and House Committees during Hearings in the 79th, 80th, and 81st Congresses to protest the administrative interpretation and in some instances to propose specific amendments to change

---

Hearings, H. R. 584, H. J. Res. 91 before Subcommittee No. 2 of House Committee on Judiciary, 80th Cong., 1st Session, pp. 412–418.

Hearings, H. R. 40, H. R. 274, H. R. 284, H. R. 1422, H. R. 2578, H. R. 2980, H. R. 3764, H. R. 3766, H. R. 3886, H. R. 3976, before Subcommittee No. 4 of House Committee on Education and Labor, 80th Cong., 1st Session, pp. 447–461 (Volume 1); 1425–1441 (Volume 3).

Hearings, S. 49, S. 154, S. 160, S. 161, S. 557, S. 731, S. 1048, S. 1076, S. 1228, S. 1400, S. 1404, S. 1509, S. 2062, S. 2386, before Subcommittee of Senate Committee on Labor and Public Welfare, 80th Cong., 2d Session, pp. 237–250 (Part 1).

Hearings, H. R. 2033, before House Committee on Education and Labor, 81st Cong., 1st Session, pp. 454–468 (Volume 1).

[9] Hearings, H. R. 40, etc., Proposed Amendments of the Fair Labor Standards Act, before Subcommittee No. 4 of House Committee on Education and Labor, 80th Cong., 1st Session, testimony of the former Administrator Walling, p. 2321, *et seq.* (Volume 4) and that of Administrator McComb and Chief of Interpretations Nystrom, p. 2533 *et seq.* (Volume 4).

that interpretation. For example, the Executive Secretary for the Association which has filed the brief *amicus curiae* here appeared before the House Committee of the 80th Congress holding hearings on several bills proposing broad amendments to the Act, and recommended an addition to Section 3 (i)—the definition of "goods"—which would expressly exclude "materials such as, but not limited to, sand, gravel, asphalt, concrete, macadam, or railroad ties which are used within the State of production in the construction, maintenance, repair, or reconstruction of instrumentalities or facilities of commerce" (Hearings, H. R. 40, etc., before Subcommittee No. 4 of House Education and Labor Committee, 80th Cong., 1st Sess., pp. 1374–1375). As an alternative he proposed a similar amendment to the definition of "production" in Section 3 (j), or an amendment to the definition of "commerce" in Section 3 (b) "by stating that 'commerce' does not mean the instrumentalities or facilities of commerce" (*id.* at p. 1375). Similar proposals were made before a Subcommittee of the Senate Labor and Public Welfare Committee, 80th Congress, 2d Sess. during hearings on numerous bills proposing comprehensive amendments to the Act. (Hearings, S. 49 and 13 other bills, Part 2, p. 1229, at 1230). No such amendment was either then or later adopted by Congress, although numerous other amendments to the Act, some of them restrictive of coverage, have been enacted. See particularly

Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910; and Portal-to-Portal Act of 1947, c. 52, 61 Stat. 84.

Petitioner and the brief of *amicus curiae* purport to find an intent to overturn the administrative interpretation in the 1949 Amendments. However, no mention whatsoever appears in the House or Senate Reports and debates on these amendments indicating any intent to change this interpretation or the court decisions on which it was predicated. The significance of this silence is evident from the fact that express consideration was given and statements made with respect to many other court decisions and administrative interpretations on the coverage of the Act. See House Managers Report, H. Report No. 1453, 81st Congress, 1st Sess.; Statement of a Majority of the Senate Conferees, 95 Cong. Rec. 14,874, October 18, 1949; Statement of the Conferees of the House, 95 Cong. Rec. 14,928, October 18, 1949. As has been pointed out, no specific amendment deals with the instant problem, although numerous efforts to amend the Act in that respect had been made.

The reference to *Schroeder Co.* v. *Clifton*, 153 F. 2d 385 (C. A. 10), certiorari denied, 328 U. S. 858, in House Report No. 1453, on which petitioner and *amicus curiae* rely (Pet. Br. p. 21; *amicus curiae* Br. p. 24), has no bearing on the issue here presented. It refers only to that part of the *Schroeder* decision relating to the quarrying of rock for construction of a dike to protect

from flooding an oil field producing oil for commerce.[10] As conceded in the brief of *amicus curiae*, the report "does not refer directly to employees involved in the other branch of the *Schroeder* case" (Br. p. 25). Not only is there no such direct reference but no reference whatsoever was made in this report, or in anything else in the legislative history, to this "other branch" of the *Schroeder* case—the issue of coverage of production of materials for use in the repair of interstate roads and instrumentalities.

In view of the extensive, explicit consideration previously given to the administrative interpretation here in question, and the unsuccessful attempts to amend the law with respect to it, petitioner's contention that disapproval of the other aspect of the *Schroeder* case implies approval of this aspect (Br. p. 25; see also *amicus curiae* Br. pp. 21–22) is plainly untenable. At the time of the enactment of the 1949 Amend-

[10] Coverage of this work depended upon the portion of Section 3 (j) of the Act covering "any process or occupation necessary to the production" of goods which were shipped in commerce. This phrase of Section 3 (j) of the Act was amended by the 1949 Amendments so as to read "any closely related process or occupation directly essential to the production." Coverage in the instant case rests, not upon the ground that the work in question is an occupation "necessary to" or "closely related" and "directly essential to" production of other goods for interstate commerce, but on the ground that the preparation of materials specifically for use in repair and maintenance of instrumentalities of commerce is a part of such commerce or is production directly "for commerce," without reference to the amended phrase.

ments it was well known that the Administrator was still asserting coverage of the production of materials for repair and maintenance of interstate instrumentalities and that two cases instituted by the Administrator (the instant case and *Tobin* v. *Johnson, supra,* p. 11) were then pending in the courts. Thus, far from disapproving this administrative interpretation, Congress, with full knowledge of it, left it in effect, indeed expressly so by Section 16 (c) of the Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910 at 920, which provides:

> Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act.

4. *The soundness of the decision below is not affected by the fact that the original adminis-*

trative interpretation was different.—It is true that the Administrator, prior to 1945, interpreted the Act as inapplicable to the situation here involved. But he corrected his interpretation almost eight years ago.[11] As this Court and the Administrator himself have repeatedly cautioned, "the Fair Labor Standards Act puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute" (*Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 523), and the Administrator's interpretations, while entitled to great weight, "are not, of course, conclusive, even in the cases with which they directly deal." (*Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139). Thus the Administrator has consistently cautioned in the announcement of his interpretations that they "serve only to indicate the construction of the law which will guide the Administrator in the performance of his administrative duties

[11] The Administrator's position was stated in a press release (Release A–14), issued March 1945, 1945 W. H. Man. 1497, and repeated in his General Statement as to the Coverage of the Wage and Hour Provisions of the Fair Labor Standards Act of 1938, issued July 1947, 29 CFR, 1947 Supp., Part 776 (12 F. R. 4583), Section 776.7 paragraph (c); incorporated in Interpretative Bulletin, General Coverage of the Wage and Hour Provisions of the Fair Labor Standards Act of 1938, as amended, 29 C. F. R., c. V, Part 776, subpart A, May 1950 (15 F. R. 2925). The portion pertinent here (Section 776.21 (a) and (b)), appears in the record of this case (R. 52–56). As stated explicitly in the Release itself, this represented a change in the Administrator's previous interpretation (1945 W. H. Man. 1497–98).

unless he is directed otherwise by authoritative rulings of the courts or unless he shall subsequently decide that his prior interpretation is incorrect." [12]

In this connection, see the very pertinent statement by Chief Judge Learned Hand in upholding a similarly changed administrative interpretation under the Agricultural Adjustment Act in the case of *Dairymen's League Cooperative Ass'n* v. *Brannan*, 173 F. 2d 57 (C. A. 2), certiorari denied, 338 U. S. 825. There, Judge Hand observed that the original administrative interpretation was issued "at a time when, in the nature of things, interpretation was tentative, or, if it was not, ought to have been. We are indeed aware how great an advantage familiarity with the multifarious ramifications of such a subject as milk regulation gives to administrators, and how much less favored are we who must plunge into it unequipped. Nevertheless, we should have to endow them with almost supernatural powers, if they were not, like ourselves, at the outset stunned and confounded by the fantastic proliferation which emerges, when one attempts to find a path through such verbal mazes. We are satisfied that the second thought of the Ad-

[12] See, for example, Interpretative Bulletin No. 5, reissued as revised November 27, 1939, "Further Statement as to Coverage of the Fair Labor Standards Act of 1938" (1940 Wage Hour Manual 131). See also Interpretative Bulletin No. 1, "General Statements as to Coverage of the Fair Labor Standards Act of 1938," first issued September 22, 1938 (1940 Wage Hour Manual 129). For more recent reiterations of this caution, see 12 F. R. 4583, 29 CFR, c. V, Part 776; 12 F. R. 7665, 29 CFR, 1951 Supp., c. V, Part 776.

ministrator was better than his first; and we do not feel bound to accept the early ruling." 173 F. 2d at 65–66.

During the almost eight years that the Administrator's changed interpretation has been in effect, Congress, as noted above, pp. 27–30, has had numerous occasions to consider it and the several attempts to overcome it by legislation (including attempts by *amicus curiae* here) have proved unsuccessful. Moreover, as more fully shown, *infra*, the corrected interpretation has been the view consistently adopted by the federal courts of appeals. This impressive legislative and judicial support for the decision below more than offsets, we submit, any doubt the original administrative view may have cast upon its soundness.

5. *The corrected administrative interpretation accords with the construction of the statutory language adopted by most courts, and in particular by a consistent line of decisions of the federal courts of appeals.*—At least four Circuits—the Third, Fifth, Sixth and Eighth—have adopted the construction of the statute here advanced by the Government. Both circuits which have ruled on the specific issue of coverage of so-called "off the road" workers producing materials for the repair and maintenance of interstate instrumentalities (the court below here and the Eighth Circuit) have reached the same result by unanimous decisions. See *Tobin* v. *Johnson*, petition for certiorari pending, No. 336, this Term. And the two

other circuits have expressly adopted the same rationale with respect to the production of ice and electricity for use in operating instrumentalities of commerce. *Atlantic Co.* v. *Walling,* 131 F. 2d 518 (C. A. 5); *Lewis* v. *Florida Power & Light Co.,* 154 F. 2d 751 (C. A. 5); *Chapman* v. *Home Ice Co.,* 136 F. 2d 353 (C. A. 6), certiorari denied, 320 U. S. 761; *Southern United Ice Co.* v. *Hendrix,* 153 F. 2d 689 (C. A. 6).

The reasoning underlying this construction was clearly and simply expressed as early as June 1941 in the opinion of District (now Circuit) Judge Russell in *Fleming* v. *Atlantic Co.,* 40 F. Supp. 654, at 660 (N. D. Ga.), "affirmed throughout" by the Fifth Circuit, *sub nom. Atlantic Co.* v. *Walling,* 131 F. 2d 518. In an opinion, characterized by the Court of Appeals as "thoughtful and carefully worked out" (131 F. 2d, at 520), Judge Russell held that the manufacture and delivery of ice to railroads for refrigeration of railroad cars used to transport perishable goods was "production of goods for commerce." His reasoning was as follows (40 F. Supp. at 660–661):

> "For," though not defined, is doubtless employed in its most general sense, indicating that in consideration of which, in view of which, or with reference to which, anything is done or takes place, *or as indicating the end to which anything acts, serves* or is done, "as a preparation towards or in view of; having as goal or object; * * * *to serve as part of; to sup-*

ply the need of; in order to effect." Webster's New International Dictionary.

After lengthy and serious consideration, the meaning and extent of the word "for" looms large in determining in one's mind the application of the Act intended by Congress. In other words, whether "for commerce" is restricted only to articles produced to be sold, shipped and transported "in commerce," or whether the words mean "produced" for the purpose of carrying on commerce, "or produced in consideration of, to serve as part of, or to supply the need of, or in order to effect commerce."

* * * * *

The "commerce" of the Act as relates to the production of goods is equally as broad as the commerce with reference to those engaged in commerce. In neither instance is the term restricted to the production, shipment, sale, transportation, or receipt of goods as articles of commerce, that is, those which are produced or sold for trade. Thus those who *maintain the means of transportation,* though having no direct connection with the manufacture, shipment, purchase or sale of the goods transported, are engaged in commerce because patently their work is essential to the carrying on of commerce. * * *

* * * * *

So commerce as generally understood, and transportation as generally understood,

> and *those acts, services and supplies which are a component part of the carrying on of such commerce, are fairly within the definition of commerce* as contained in the Act. As thus construed, the phrase engaged in "the production of goods for commerce" includes "the production of goods in view of, *or to serve as an essential part* of interstate transportation or commerce." [Italics supplied.]

The *Atlantic Co.* decision was followed by the Sixth Circuit in *Chapman* v. *Home Ice Co.*, 136 F. 2d 353, at 355, certiorari denied, 320 U. S. 761, where it was again emphasized that the statutory objectives as well as the literal language of the Act required such construction:

> In the light of these decisions and the admonition in *Overstreet* v. *North Shore Corporation*, 318 U. S. 125, * * *, decided February 1, 1943, that the Fair Labor Standards Act aims at protecting commerce from injury through adjustment of the master-servant relationship by eliminating substandard working conditions, we are constrained to hold that the employees of the appellee who were engaged in the production, transportation or delivery of ice intended for servicing interstate facilities were engaged in the production of goods for commerce. * * *

To the same effect see *Southern United Ice Co.* v. *Hendrix*, 153 F. 2d 689 (C. A. 6); *Hansen* v. *Salinas Valley Ice Co.*, 62 Cal. App. 2d 357, 144

P. 2d 896 (1944); *Lewis* v. *Florida Power & Light Co.*, 154 F. 2d 751 (C. A. 5), involving the production of electricity for local distribution some of which was used in operating railroad signal devices and airport beacons. See also *Hamlet Ice Co.* v. *Fleming*, 127 F. 2d 165 (C. A. 4), certiorari denied, 317 U. S. 634, which reached the same result as in the other ice company cases although not apparently on the basis of the rationale of the *Atlantic Co.* opinion.

These principles were most recently applied in the decision of the Eighth Circuit in *Tobin* v. *Johnson*, 198 F. 2d 130, petition for certiorari pending, No. 336, this Term, which followed the decision below in the instant case to hold that "off-the-road" quarry workers producing material for use in the repair and maintenance of interstate instrumentalities were engaged in the production of goods for commerce. Accord: *McComb* v. *Carter*, (not officially reported) 8 WH Cases 489, 16 Labor Cases ¶64,964 (E. D. Va. 1948), involving truck drivers and a mechanic hauling and otherwise handling sand and gravel for use in repair of the Virginia State Highway system; see also *Walling* v. *Staffen*, 5 F. R. D. 236 (W. D. N. Y. 1946).

In the light of these authorities supporting the view here advanced by the Government, particularly the consistent line of decisions in the federal appellate courts, petitioner's assertion that "judicial expression has been overwhelm-

ingly in support of petitioner's position" (Br. p. 28), is plainly untrue.[13]

[13] Admittedly, as the court below noted, there has been some conflict in the federal district court decisions (R. 68, fn. 6), as well as in the state court decisions. Those which appear to be contrary to the administrative construction are cited in petitioner's brief, pp. 28–30. Most, if not all of these decisions are of dubious weight. *Walling* v. *Craig*, 53 F. Supp. 479 (D. Minn., 1943), for example, involved no contest on this issue since it was decided before the adoption of the administrative interpretation here advanced, and moreover is contrary to the decision of the court of appeals in that circuit (*Tobin* v. *Johnson*, 198 F. 2d 130 (C. A. 8), pending on petition for certiorari, No. 336, this Term); similarly *McComb* v. *Trimmer*, 85 F. Supp. 565 (D. N. J., 1949), is contrary to the decision of its court of appeals, the Third Circuit, in the case at bar; *Crabb* v. *Welden Bros.*, 65 F. Supp. 369 (S. D. Iowa, 1946), as noted in the text, p. 43, *infra*, was predicated on the fact that original construction only was involved, as the Eighth Circuit's decision in that case and in *Tobin* v. *Johnson* demonstrate; *Wiley* v. *Stewart Sand & Material Co.*, 240 Mo. App. 392, 206 S. W. 2d 362 (1947) was decided on the authority of the Missouri Supreme Court's decision in *Fountain* v. *St. Joseph Water Co.*, 352 Mo. 817, 180 S. W. 2d 28 (1944), which is in direct conflict with this Court's decision in *Roland Electric Co.* v. *Walling*, 326 U. S. 657, 663, holding that the Act "does *not* require the employee to be employed even in the production of an article which *itself* becomes the subject of commerce or transportation among the several states." *Barbe* v. *Cummins Const. Co.*, 49 F. Supp. 168 (D. Md., 1943), is simply not in point because it involves only the original construction of a building; *Ramos* v. *P. R. Cement Corp.* (not officially reported), 5 WH Cases 956, 10 Labor Cases ¶63,000 (D. P. R., 1946), was decided on a motion to dismiss without a trial of facts. This same defect is present in *Thomas* v. *Hempt Bros.*, No. 440, this Term, in which certiorari was granted simultaneously with the grant of certiorari in the instant case. See discussion of this case in the text, *infra*, pp. 43–44.

The reasoning of the so-called ice company cases persuaded the Administrator, after careful consideration of the views and arguments of industry representatives, that his earlier interpretation should be changed to accord with the court decisions. If the production of ice is production of goods for commerce because it is produced "to serve as a part of, or to supply the need of" interstate commerce, or for the purpose of "servicing interstate facilities," then so is production of material which is produced for the very purpose of becoming a part of and maintaining interstate highways in condition to perform their function of transporting commodities and persons interstate. Petitioner and *amicus curiae* seek to distinguish these decisions from the instant case on the ground that some of the ice itself moved across state lines. The supposed distinction, at best, is factually speculative, since it does not appear in some of these cases whether the ice actually moved across State lines. See e. g., *Chapman* v. *Home Ice Co.*, 136 F. 2d 353 (C. A. 6), certiorari denied, 320 U. S. 761; *Southern United Ice Co.* v. *Hendrix*, 153 F. 2d 689 (C. A. 6). In any event it is clear that most of these decisions were not grounded on this factor but rather were based on the rationale quoted in the text, *supra*, pp. 36–38, from the *Atlantic Co.* opinion.

The decision of the court in *Schroeder Co.* v. *Clifton*, 153 F. 2d 385 (C. A. 10), certiorari

denied, 328 U. S. 858, rehearing denied, 329 U. S. 821, on which petitioner relies heavily (Br. pp. 13, 29), does not conflict with the rationale of the above decisions. That case involved the application of the Act to employees of a quarry whose product was used for the construction of some railroad trackage and highways which were new segments to be connected to an existing interstate highway and railway to replace portions of those roads expected to be inundated. The district court held that the employees were engaged in the production of goods for commerce and that it was unnecessary to decide whether this was original construction or reconstruction. 5 W. H. Cases 286, 9 Labor Cases ¶62,679. In the decision of the Court of Appeals for the Tenth Circuit reversing the district court, each of the three participating judges expressed a different view. Judge Huxman, dissenting, stated his view that the judgment of the trial court on this point "should be affirmed" (153 F. 2d at 394). Of the two judges forming the majority, Judge Bratton alone rejected the reasoning of *Atlantic Co.* v. *Walling*, 131 F. 2d 518 (C. A. 5) without distinguishing between original construction and repair. The deciding vote was cast by Judge Phillips who, in his separate opinion, appeared to accept, or at least explicitly refrained from controverting, the rationale of the *Atlantic Co.* case and the other similar decisions. He stated that in his view the doctrine of those decisions had no bearing

on the facts of the *Schroeder* case because of his assumption that the *Schroeder* case involved "new construction," which was outside the scope of the Act for other reasons. 153 F. 2d at 391, 393.[14] That Judge Phillips' opinion is certainly not inconsistent with the position here advanced by the Government is evident by comparison of the Eighth Circuit decision upholding coverage in *Tobin* v. *Johnson*, 198 F. 2d 130, which did not involve original construction, with that same court's decision in *Crabb* v. *Welden Bros.*, 164 F. 2d 797 (C. A. 8) which, on the ground that original construction was involved, reached the same result as had Judge Phillips in *Schroeder Co.* v. *Clifton*.

This analysis of the *Schroeder* case, we think, demonstrates the error of the Supreme Court of Pennsylvania in *Thomas* v. *Hempt Bros.* No. 410, this Term, in which certiorari was granted simultaneously with the grant of certiorari in the instant case. The Pennsylvania Supreme Court's main reason for refusing to follow the decision of the federal Court of Appeals in its Circuit was predicated upon the erroneous assumption that the decision *of the court* in *Schroeder Co.* v. *Clifton* was in conflict with the Third Circuit's decision. Moreover, in addition to misconstruing

[14] Compare the later decisions holding that construction of new segments of existing roads and railroads is not original construction but is covered by the Act as repair and maintenance work. *Walling* v. *McCrady Const. Co.*, 156 F. 2d 932 (C. A. 3), certiorari denied, 329 U. S. 780; *Bennett* v. *Loftis Co.*, 167 F. 2d 286 (C. A. 4).

the opinion of one Judge as the decision of the court, the Pennsylvania Supreme Court misconstrued the decision below as depending upon the "process or occupation necessary to the production" language of the Act. Finally, the Pennsylvania Supreme Court erred in undertaking to resolve this important question of coverage without a trial or other adequate factual development, contrary to this Court's decision in *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, 257.[15]

B. EMPLOYEES ENGAGED, AS AN INTEGRATED UNIT, IN THE REPAIR AND MAINTENANCE OF INTERSTATE HIGHWAYS, ROADS, AND RAILROADS ARE "ENGAGED IN COMMERCE," WHETHER THEIR WORK IS "ON THE ROAD" OR "OFF THE ROAD"

As already noted, petitioner concedes (R. 88), as indeed it must, that employees directly apply-

[15] Contrast the more careful approach of the Eighth Circuit in *McComb* v. *Johnson*, 174 F. 2d 833, where that Court in reliance on *Kennedy* v. *Silas Mason*, *supra*, refused to decide this issue on the pleadings and remanded the case for a full trial. While we believe that the issue presented in all three cases is substantially the same, there is the factual difference that in the instant case the petitioner not only produces the road materials but himself actually performs the repair work. If this Court concludes that this factual difference makes the issue substantially different, we submit that the issue presented by the complaint in *Thomas* v. *Hempt Bros.* should not be determined on the basis of the incomplete factual record in that case, but that certiorari should be granted in *Tobin* v. *Johnson*, 198 F. 2d 130, pending on petition for certiorari, No. 336, this Term, which presents the issue on a full record of the facts in a suit to which the Government is a party. Indeed, it is not clear from the complaint that Hempt Brothers did not also apply the material on the roads. Petitioner states that they do (Br. pp. 1–2, 3).

ing the materials to interstate highways, roads, and railroads are engaged "in commerce" because they are engaged in the repair and maintenance of instrumentalities of interstate commerce. In *Overstreet* v. *North Shore Corporation,* 318 U. S. 125; *Pedersen* v. *J. F. Fitzgerald Construction Co.,* 318 U. S. 740, modified and petition for rehearing denied, 318 U. S. 742, and *Fitzgerald Co.* v. *Pedersen,* 324 U. S. 720, the Act was held applicable to employees engaged in the maintenance and repair of interstate instrumentalities because their work is "so intimately related to interstate commerce 'as to be in practice and legal contemplation a part of it' ". *Overstreet,* 318 U. S. at 128 and 130; *Pedersen,* 318 U. S. 740, and 324 U. S. at 724–725. In reaching the conclusion that such repair work was interstate commerce this Court applied the principle—first announced in *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564, 567 that: " 'It is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce'. And in determining what constitutes 'commerce' or 'engaged in commerce' we are guided by practical considerations." The "practical considerations" underlying this ruling are that the repair and maintenance workers are "vital to the proper functioning of these structures as instrumentalities of interstate commerce" (*Overstreet,* 318 U. S. at 128, 130) "because without their service these

instrumentalities would not be open to the passage of goods and persons across the state lines" (*ibid.*).

The "practical considerations" in the instant case plainly do not warrant an arbitrary distinction between "on-the-road" and "off-the-road" employees, where the functions of both groups, as the district court found, are "all component parts of an integrated unit" (R. 14). As this Court pointed out in one of its earliest decisions under this Act (*Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 520), "there is no mechanical rule or 'dependable touchstone by which to determine whether employees are 'engaged in commerce or in the production of goods for commerce.'" Thus the courts below correctly refused to apply petitioner's rigid formula, resting their decisions instead upon consideration of the practical relationship of the employees' work to the interstate commerce.

The preparation and hauling of materials and road mixes needed for specific road repairs are just as "indispensable" and "vital" to the proper functioning of the instrumentalities of commerce, as the physical application of that material was held to be in the *Overstreet* case. In the instant case this is particularly true. There is ample support in the undisputed evidence for the district court's finding that the functions at petitioner's mixing plants were "all component parts of an integrated unit" (R. 14). The vital part the

mixing operation plays in the completed project is constantly recognized in petitioner's day-to-day dealings with the State. This function is considered so important as to be a matter of detailed specification in the road repair contracts (R. 51). The road mixes are ordinarily hauled to the road site immediately after production, and there is considerable interchange of duties among employees at the production plants and at the road sites. "On-the-road" employees, as well as "off-the-road" employees, use the production plants as headquarters.

The decisions of this Court and of the various courts of appeals have repeatedly held the "in commerce" coverage of the Act applicable to employees who do not physically work on the instrumentality of interstate commerce. See *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, affirming the decision of the Fifth Circuit applying the "in commerce" coverage to those who "write the letters, keep the books" [off the road], as well as to those who "load and unload or drive the trucks" [on the road]. 128 F. 2d 395, 398; *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, rehearing denied, 317 U. S. 706, holding an "off-the-road" rate clerk for an interstate motor carrier to be "engaged in commerce." See also *Ritch* v. *Puget Sound Bridge and Dredging Co.*, 156 F. 2d 334, 337 (C. A. 9) (holding the Act applicable to "white collar" workers physically removed from the instrumentality on which the

construction was being done, stating that "they have the immediacy of participancy lacking in the cook of *McLeod* v. *Threlkeld.*"); *Laudadio* v. *White Construction Co.*, 163 F. 2d 383 (C. A. 2) (holding the Act applicable to estimators and draftsmen performing preparatory paper work on the instrumentality); *New Mexico Public Service Co.* v. *Engel*, 145 F. 2d 636 (C. A. 10) (holding covered as engaged "in commerce" employees of an electric power company 4% of whose power was used locally to operate railroad crossing signals, to charge storage batteries on a long distance telephone switchboard of the telephone company, and to light field and beacon lights and other equipment at the municipal airport); *Bennett* v. *Loftis Co.*, 167 F. 2d 286 (C. A. 4) (holding covered a watchman employed to guard the construction of a new bridge which had never carried interstate traffic and was some distance removed from the highways then being used to carry such traffic, but which when completed was to connect with roads leading to interstate highways). In the last cited case the Fourth Circuit, noting that the plan was "one single integrated project", made the following statement which is directly applicable here (167 F. 2d at 288):

> If the declared purpose of the Act is to be accomplished, a project should be considered as a whole, in a realistic way; not broken down into its various phases so as to defeat the purpose of the Act. This

latter unrealistic approach was condemned by the Supreme Court in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564.

If the work here is viewed realistically as "an integrated unit," the employees mixing and hauling the materials to be applied to the roads immediately (frequently while still hot), would seem no less "intimately related to interstate commerce" or "vital to the proper functioning of these structures as instrumentalities of interstate commerce" (*Overstreet*, 318 U. S. at 128 and 130), than the employees who apply the materials to the roads. The truck drivers, at least, are squarely within the decision of this Court in *Pedersen* v. *Delaware, L. & W. R. Co.*, 229 U. S. 146. That case, though decided under the Federal Employers' Liability Act, has repeatedly been recognized as authoritative on the question of the scope of the "in commerce" coverage of this Act. (*Overstreet* v. *North Shore Corp.*, 318 U. S. 125; *McLeod* v. *Threlkeld*, 319 U. S. 391; *J. F. Fitzgerald Const. Co.* v. *Pedersen*, 324 U. S. 720; *Boutell* v. *Walling*, 327 U. S. 463.) At the time of his injury Pedersen was carrying a bolt to the Duffield Bridge in Hoboken, New Jersey, to be used by him that night or the next morning in repairing the bridge, then being used by the railroad in interstate and intrastate commerce. While walking on the James Avenue Bridge *en route* from a tool car to the Duffield Bridge, he was injured through the negligence of a fellow employee. This Court

held (229 U. S. at 152) that he could recover notwithstanding.

> The point is made that the plaintiff was not at the time of his injury engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce.

The employee transporting the repair materials to the instrumentality to be repaired is indistinguishable from the truck drivers here who carry the repair material from the plants where it is manufactured to the road sites where it is used. The integration here is even closer, for here it is stipulated (R. 28) that the material is applied to the roads "*immediately* after production" (the hot mix indeed *must* be so applied), whereas Pedersen did not intend to use the bolt to repair the Duffield Bridge until that night or the next morning. The employees engaged in mixing the materials would appear just as intimately related to

interstate commerce as the "off the road" clerical workers and the rate clerk held to be engaged "in commerce" in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, affirming 128 F. 2d 395, 398 (C. A. 5), and *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, rehearing denied 317 U. S. 706; or the "off the road" service and maintenance employees in *Boutell* v. *Walling*, 327 U. S. 463; or the back-shop railroad employees in *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515.

That Congress intended to reach employees of this type is also quite evident from the legislative debates discussed, *supra*, under Point A, pp. 20–22. Senator Minton, during the colloquy between Senators Borah and Bailey, specifically pointed out that the Supreme Court had recently held back-shop employees "to be in commerce," referring to *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515. (83 Cong. Rec. 9172, 75th Cong. 3rd Sess.) The *Virginian* case described these back-shop activities as having "such a relation to the other confessedly interstate activities of the petitioner that they are to be regarded *as a part of them.*" 300 U. S. at 556 (emphasis supplied). The work of the mixing-plant employees in the instant case is similarly "a part of" other confessedly interstate ["on the road"] activities and therefore within the scope of the "in commerce" coverage of this Act.

Petitioner cites *McLeod* v. *Threlkeld*, 319 U. S. 491, as rejecting "the argument that the conception of 'in commerce' be extended *beyond* the employees engaged in actual work upon the transportation facilities" (Br. p. 26). The *McLeod* decision plainly has no such broad implications. In holding the Act inapplicable to a cook employed by an independent contractor to prepare meals for railroad maintenance employees, the Court obviously was not concerned with any physical remoteness of McLeod's work from the operation of the transportation facilities. McLeod, in effect, was an "on-the-road" employee since he served meals "in a cook and dining car attached to a particular gang of workmen and *running on the railroad's tracks*" (emphasis supplied); 319 U. S. at 492. The basic reason for the decision in *McLeod* was that the cook "supplies" the personal needs" only of the employees, that is, food which is "consumed apart from their work." 319 U. S. at 497. Thus it was plainly the functional, not any physical, remoteness of the cook's work from the operation of the trains, which precluded his recovery. The reasons for that decision, therefore, can have no application to employees who furnish the very material specified in the construction contract for the maintenance of the instrumentality itself. See *Boutell* v. *Walling*, 327 U. S. 463 (decided subsequent to the *McLeod* case), holding the "in commerce" cov-

erage applicable to "off-the-road" employees engaged in repairing, servicing, and maintaining motor transportation equipment.[16]

[16] Petitioner's objection to the "sweep" of the injunction (Br. p. 30) is plainly without merit. As the court of appeals pointed out (R. 70), the injunction in terms is limited to employees "engaged in interstate commerce or in the production of goods for commerce, *within the meaning of the Act*" (emphasis the Court's). Petitioner expresses alarm that this may include employees whose duties may be confined to the 15% of its work not shown to be related to interstate commerce. The district court correctly found on the facts before it that all of petitioner's employees come within the Act. It was stipulated that there was no segregation between petitioner's employees, either on or off the road, as to the type of project to which their work related (R. 27–28), and admittedly petitioner's business was overwhelmingly on interstate instrumentalities. It was, therefore, entirely appropriate for the district court to infer that all of petitioner's employees regularly spent substantial time on the 85% of petitioner's work which was concerned with the repair and maintenance of interstate instrumentalities, in the absence of any evidence whatsoever that any employee at any time confined his work exclusively to the "local" projects. *Guess* v. *Montague*, 140 F. 2d 500, 504 (C. A. 4); see also *National Labor Relations Bd.* v. *Van Deusen*, 138 F. 2d 893, 894 (C. A. 2). Each, therefore, is entitled to the benefits of the Act on the principle that a substantial portion of his duties are within its coverage. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564. Even if it were necessary for the opinions of the courts below to discuss hypothetical situations having no basis in the facts before them, as petitioner's argument assumes, the opinions below are not deficient in this, for each points out the typical situation in petitioner's industry in which the Act (and, hence, the identically worded injunction) has no application (R. 13, 70).

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

WALTER J. CUMMINGS, Jr.,
Solicitor General.
WILLIAM S. TYSON,
Solicitor.
BESSIE MARGOLIN,
Assistant Solicitor,
WILLIAM A. LOWE,
JOSEPH D. MLADINOV,
Attorneys,
United States Department of Labor.

JANUARY 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1953